HOCK SENG LEE TIMBER SDN BHD v. YII CHI HAU & ANOR

COURT OF APPEAL, PUTRAJAYA
TENGKU MAIMUN TUAN MAT JCA
BADARIAH SAHAMID JCA
KAMARDIN HASHIM JCA
[CIVIL APPEAL NO: Q-02(NCC)(A)-1127-06-2016]
12 JANUARY 2017

COMPANY LAW: *Winding up – Petition – Affidavit to oppose petition – Whether filed out of time – Whether there was non-compliance of r. 30(1) of Companies (Winding-up) Rules 1972 – Whether rr. 193 & 194 of Rules read together with s. 221(2) of Companies Act 1965 gives power to court to exercise discretion to abridge time – Application for extension of time – Whether company should be given right to be heard – Principle of stare decisis – Whether applicable – Failure to consider company's oral application – Whether caused prejudice and injustice – Whether appellate intervention warranted – Whether extension of time ought to be granted – Whether winding up petition ought to be heard on merit – Companies Act 1965, s. 355(1)*

CIVIL PROCEDURE: *Extension of time – Application for – Filing of affidavit to oppose winding up petition – Whether filed out of time – Whether there was non-compliance of r. 30(1) of Companies (Winding-up) Rules 1972 – Whether non-compliance caused substantial injustice – Whether rr. 193 & 194 of Rules read together with s. 221(2) of Companies Act 1965 gives power to court to exercise discretion to abridge time – Whether company should be given right to be heard – Whether extension of time ought to be granted – Whether winding up petition ought to be heard on merit – Companies Act 1965, s. 355(1)*

The appellant was an investment company dealing mainly in timbers and woods for import and export. The respondents, the shareholders, contributories and former directors of the appellant company, filed an application to wind up the company on the ground that its present directors had conducted the affairs of the company in their own interest; in a manner which was unjust and unfair and that the respondents had been deprived of their rights to equal participation in the management and affairs of the company. The respondents prayed, *inter alia*, for an order that the appellant be wound up under the provisions of the Companies Act 1965 ('the Act'). The petition was filed under s. 218(1)(f) and/or (i) of the Act. On 22 April 2016, the appellant filed an affidavit to oppose the petition ('encl. 31') on the ground that the respondent had filed the petition in bad faith and with unclean hands. The appellant submitted that it was a financially healthy company with profit making subsidiaries. During the hearing of the petition, the respondents raised an objection on the non-compliance of r. 30(1) of the Companies (Winding-up) Rules 1972 ('Winding-up Rules 1972'). The

respondents argued that since encl. 31 was filed out of time, the appellant had 'no leg to stand to oppose and/or to pursue any courses before the winding up court'. The appellant argued that it be given a right to be heard on the merits of the petition and made an oral application for an extension of time for encl. 31. Notwithstanding having made the oral application, the appellant filed a formal application under rr. 193 and 194 of the Winding-up Rules 1972 to abridge and/or enlarge time for encl. 31 ('encl. 39'). The appellant's main ground for encl. 39 was that it should be given the right to be heard and that no injustice would be caused by allowing the application. The trial judge allowed the winding up petition on the ground that encl. 31 was not filed in compliance with r. 30(1) of the Winding-up Rules 1972. The petition was not heard on the merits and neither was encl. 39. Thus, the appellant appealed against the said decision of the High Court. The issue that arose was whether the trial judge had erred in disregarding encl. 31 and in holding that the appellant had not complied with r. 30(1) of the Winding-up Rules 1972.

Held (allowing appeal; setting aside order of the High Court)
Per Kamardin Hashim JCA delivering the judgment of the court:

(1) Although the wordings of r. 30(2) of the Winding-up Rules 1972 seem to be mandatory in nature, one must not lose sight of the general powers of the court to abridge time as envisaged under rr. 193 and 194(1) of the same. The powers of the court to extend or abridge time are not restricted by the words employed in r. 30(2) of the Winding-up Rules 1972. Rules 193 and 194 of the Winding-up Rules 1972, together with s. 221(2) of the Act, clearly give the court power to exercise its discretion to abridge the time prescribed in r. 30(2). The Winding-up Rules have to be read harmoniously, and the rigours of r. 30(2) must be tempered by rr. 193 and 194 of the Winding-up Rules 1972 and s. 221(2) of the Act. It is clear from s. 355(1) of the Act that technical non-compliance can only invalidate a proceeding under the Act if the court is of the view that substantial injustice has been or may be caused by such non-compliance and the injustice cannot be remedied by any court order. (paras 29-32)

(2) The trial judge had not sufficiently considered the material facts which had tainted Her Ladyship's decision in exercising her discretion judicially as required under the law which were (i) that the oral application was made by the appellant during the hearing of the petition and as such Her Ladyship had erred in forming the view that no such application was ever made; (ii) that rr. 193 and 194 Winding-up Rules 1972 do not state that any such application must be made before the hearing of a winding up petition; and (iii) the trial judge had acted against the principle of *stare decisis* in limiting the *ratio* of the Federal Court in *Kilo Asset Sdn Bhd v. Hew Tai Hong*. (para 39)

(3) It was the bounden duty of the trial judge to consider the oral application and/or the appellant's application in encl. 39 as any delay to hear the same could not occasion a failure of justice to the respondents. The failure of the trial judge to consider the appellant's oral application and/or encl. 39 application for an extension of time in fact caused prejudice and great injustice to the appellant which warranted appellate intervention. Given the various applications and on-going trial on the dispute amongst the parties involved, justice of the case would be best served if the winding up petition could be heard on the merits. (para 40)

Bahasa Malaysia *Headnotes*

Perayu adalah sebuah syarikat pelaburan yang berurusan dengan balak dan kayu untuk diimport dan dieksport. Responden-responden, iaitu pemegang saham, penyumbang dan bekas pengarah syarikat perayu, memfailkan permohonan untuk menggulung syarikat atas alasan pengarah-pengarah telah menjalankan hal ehwal syarikat mengikut kepentingan mereka sendiri dengan cara yang tidak adil dan bahawa responden-responden dilucutkan hak-hak mereka untuk turut serta dalam pengurusan dan hal ehwal syarikat. Responden-responden memohon, antara lain, untuk perintah agar perayu digulung di bawah peruntukan Akta Syarikat 1965 ('Akta'). Petisyen difailkan di bawah s. 218(1)(f) dan/atau (i) Akta. Pada 22 April 2016, perayu memfailkan afidavit membantah petisyen ('lampiran 31') atas alasan responden memfailkan petisyen dengan niat jahat dan tangan yang tidak bersih. Perayu menghujahkan syarikatnya maju serta mengaut membawa keuntungan. Semasa perbicaraan petisyen, responden-responden membangkitkan bantahan terhadap ketidakpatuhan k. 30(1) Kaedah-Kaedah (Penggulungan) Syarikat 1972 ('Kaedah-Kaedah Penggulungan 1972'). Responden-responden menghujahkan oleh kerana lampiran 31 difailkan di luar had masa, perayu 'tidak mempunyai asas untuk berdiri untuk membantah dan/atau meneruskan apa-apa tindakan di hadapan mahkamah penggulungan'. Perayu menghujahkan bahawa dia harus diberi hak untuk didengar atas merit petisyen dan membuat satu permohonan lisan untuk lanjutan masa bagi lampiran 31. Walaupun perayu telah membuat permohonan secara lisan, perayu juga memfailkan permohonan rasmi bawah kk. 193 dan 194 Kaedah-Kaedah Penggulungan untuk meringkaskan dan/atau melanjutkan masa untuk lampiran 31 ('lampiran 39'). Alasan utama perayu adalah lampiran 39 seharusnya diberi hak untuk didengar dan tiada ketidakadilan akan berlaku dengan membenarkan permohonan tersebut. Hakim bicara membenarkan petisyen atas alasan bahawa lampiran 31 tidak difailkan menurut k. 30(1) Kaedah-Kaedah Penggulungan 1972. Petisyen tidak didengar atas merit, dan lampiran 39 juga tidak didengar. Oleh itu, perayu merayu terhadap keputusan Mahkamah Tinggi. Isu yang dibangkitkan untuk pertimbangan adalah sama ada hakim bicara terkhilaf apabila tidak mengendahkan lampiran 31 dan dalam memutuskan perayu tidak mematuhi k. 30(1) Kaedah-Kaedah Penggulungan 1972.

Diputuskan (membenarkan rayuan; mengetepikan perintah Mahkamah Tinggi)

Oleh Kamardin Hashim HMR menyampaikan penghakiman mahkamah:

(1) Walaupun perkataan-perkataan k. 30(2) Kaedah-Kaedah Penggulungan kelihatan bersifat mandatori, kuasa am mahkamah untuk meringkaskan masa seperti yang digambarkan dalam kk. 193 dan 194(1) tidak boleh dilupakan. Kuasa mahkamah untuk melanjutkan atau meringkaskan masa tidak terhad dengan kata-kata dalam k. 30(2) Kaedah-Kaedah Penggulungan 1972. Kaedah 193 dan 194 Kaedah-Kaedah Penggulungan, bersama-sama dengan s. 221(2) Akta, dengan jelas memberi mahkamah kuasa untuk melaksanakan budi bicaranya untuk meringkaskan masa seperti yang diperuntukkan dalam k. 30(2). Kaedah-kaedah Penggulungan harus dibaca secara harmoni, dan ketegasan k. 30(2) mesti dilenturkan oleh kk. 193 dan 194 Kaedah-Kaedah Penggulungan dan s. 221(2) Akta. Jelas berdasarkan s. 355(1) Akta bahawa ketakpatuhan teknikal hanya boleh mentaksahkan prosiding di bawah Akta jika mahkamah berpendapat ketidakadilan telah terjadi atau boleh disebabkan oleh ketidakpatuhan itu dan ketidakadilan tidak boleh diatasi oleh mana-mana perintah mahkamah.

(2) Hakim bicara tidak mempertimbangkan fakta-fakta material dengan secukupnya dan ini mencemarkan keputusannya dalam melaksanakan budi bicara kehakiman seperti yang diperlukan di bawah undang-undang iaitu (i) bahawa permohonan lisan dibuat oleh perayu semasa perbicaraan petisyen dan oleh itu hakim bicara terkhilaf dalam dapatannya bahawa permohonan sebegitu tidak dibuat; (ii) bahawa kk. 193 dan 194 Kaedah-Kaedah Penggulungan tidak menyatakan bahawa apa-apa permohonan harus dibuat sebelum perbicaraan petisyen penggulungan; dan (iii) hakim bicara bertindak bertentangan dengan prinsip *stare decisis* dalam mengehadkan *ratio* Mahkamah Persekutuan dalam kes *Kilo Asset Sdn Bhd v. Hew Tai Hong.*

(3) Hakim bicara bertanggungjawab mempertimbangkan permohonan lisan dan/atau permohonan perayu dalam lampiran 39 oleh kerana sebab apa-apa kelewatan untuk mendengar permohonan itu tidak akan menyebabkan ketidakdilan kepada responden-responden. Kegagalan hakim bicara untuk mempertimbangkan permohonan lisan perayu dan/atau permohonan lampiran 39 untuk lanjutan masa telah memprejudiskan perayu dan menyebabkan ketidakadilan yang amat berat kepada perayu yang mewajarkan campur tangan rayuan. Memandangkan terdapat beberapa permohonan dan perbicaraan yang sedang berjalan berkenaan pertikaian antara pihak-pihak yang terlibat, keadilan kes akan diselesaikan sebaik mungkin jika petisyen penggulungan didengar berdasarkan merit.

Case(s) referred to:

Crocuses & Daffodils (M) Sdn Bhd v. Development & Commercial Bank Bhd [1997] 3 CLJ 485 ***(refd)***

Kilo Asset Sdn Bhd v. Hew Tai Hong [2016] 2 CLJ 365 ***(refd)***

Perantara Properties Sdn Bhd v. JMC - Kelana Square & Another Appeal [2016] 5 CLJ 367 ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 218(1)(f), 221(1), (2)(b), 355(1)

Companies (Winding-up) Rules 1972, rr. 30(1), (2), 193, 194

For the appellant - Alvin Chong, Victor Ng & Ratanah Devi; M/s Idris & Co

For the respondents - Albert Tang & Andy Tan Tung Sii; M/s Andy & Assocs

[Editor's note: For the High Court judgment, please see Yii Chi Hau & Anor v. Hock Seng Lee Timber Sdn Bhd [2016] 1 LNS 872 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Kamardin Hashim JCA:

[1] This is an appeal by the appellant against the decision of the High Court at Kuching which allowed the first and second respondents' winding up petition with costs of RM5,000. We heard the parties on 18 August 2016 whereby we allowed the appeal. We append below our grounds in doing so.

[2] Both the respondents (the petitioners in this winding up petition) are brothers who are the shareholders, contributories and former directors of the appellant's company (the company). The respondents filed an application to wind up the company on the ground that its present directors have conducted the affairs of the company in their own interest in a manner which is unfair and unjust and that the respondents had been deprived of their rights to equal participation in the management and affairs of the company.

[3] The appellant is a company registered in Sarawak and is an investment company dealing mainly in timbers and woods for import and export, manufacturing, planting and other objects as stated in the memorandum of association.

[4] The respondents prayed in their petition for an order that:

(a) The appellant to be wound up under the provisions of the Companies Act 1965 (the Act);

(b) Wong Ching Yong be appointed as the liquidator of the company;

(c) A declaration pursuant to s. 221(1) of the Act that the respondents hold a shareholding of RM25,000 each in the company;

(d) The costs of the petition to be borne by present directors of the company on a full indemnity basis; and

(e) Any other order made as shall be just.

Background

[5] Factual background of the matter can be traced way back in 1971 when the family business of Yii/Yu siblings started. There were ten siblings in the Yii/Yu family. They were:

(1) Yu Jih Tung (born on 19 May 1944 and passed away on 2 June 1993);

(2) The first respondent, Yii Chi Hau (born on 5 June 1949);

(3) Yu Chee Lieng (born on 10 April 1952 and passed away on 19 April 2012);

(4) Yu Chee Hoe (born on 21 July 1954);

(5) The second respondent, Yii Chee Ming (born on 23 October 1960);

(6) Yii Chee Ping (born on 20 August 1965);

(7) Yii Chee Hiong (born on 15 March 1957);

(8) Yu Chee Hung (born on 6 February 1959);

(9) Yii Chee Yiing (born on 1 November 1962); and

(10) Yii Chee Sing (born on 27 June 1968).

[6] The family business started when Yu Jih Tung and Yu Chee Lieng acquired the partnership of "Hock Seng Lee (Motor Tongkang)". Yu Chee Lieng acquired 1/4 share of the partnership on 15 November 1971 and Yu Jih Tung acquired the balance 3/4 share of the partnership on 19 February 1973. The two brothers operated and traded under the style of "M/S Hock Seng Lee".

[7] Later, on or around December 1974, Yu Jih Tung (25% shareholding), Yong Siik Ging (37.5% shareholding) and Yu Chee Hoe (37.5% shareholding) formed Hock Seng Lee Development Co.

[8] Both entities, M/S Hock Seng Lee and Hock Seng Lee Development Co flourished over the course of time and subsequently more companies were formed. The appellant is one of the companies formed. Each company had separate shareholding structures.

[9] Hock Seng Lee Development Co was subsequently made a private limited company, ie, Hock Seng Lee Development Co Sdn Bhd. The company was publicly listed and was renamed as Hock Seng Lee Berhad (HSLB). That was done in 1996. In or around the same year, six brothers

of the family formed Hock Seng Lee Enterprise Sdn Bhd (HSLESB) with equal shareholding of 16.67% each to specifically hold their shares in HSLB. HSLESB was and still is, a majority shareholder in HSLB.

[10] Between 1998 and 2002, the second respondent transferred all his shares in the various companies, including the appellant, to the other siblings and family members. His shares in HSLESB were transferred to the four sisters. There is no dispute to the fact that the second respondent had transferred all his shares in the various companies to the other siblings. The respondents contended that the shares were to be held on trust for the second respondent.

[11] The appellant company is a private limited company which was incorporated on 6 December 1977. At its inception, the shareholders were Yu Jih Tung, Yu Chee Lieng and Bong Jin Sin holding 1 share each. On 2 July 1981, Bong Jin Sin sold his one share to Yu Chee Hoe. On 5 March 1985 there were share allotment exercise where 149,997 additional shares were allotted with the following result, ie, Yu Jih Tung (30,000 shares); first respondent (30,000 shares); Yu Chee Lieng (30,000 shares); Yu Chee Hoe (30,000 shares) and second respondent (30,000 shares).

[12] Yu Jih Tung passed away on 2 June 1993. On 28.4.1999, the 30,000 shares owned by the estate of Yu Jih Tung were transferred to Francis Yu and Richard Yu in equal proportion. On the same date, the second respondent had transferred his 30,000 shares to his cousin, Yu Tung Sing, for a consideration of RM30,000. As the result of the above, the shareholding of the appellant was:

First respondent	30,000 shares
Yu Chee Lieng	30,000 shares
Yu Chee Hoe	30,000 shares
Yu Tung Sing	30,000 shares
Francis Yu	15,000 shares
Richard Yu	15,000 shares

[13] On 1 September 2004, Yu Tung Sing had transferred his 30,000 shares to Yu Chee Lieng, Yu Chee Hoe and the first respondent in equal proportion for the consideration of RM10,000 for each person. This resulted in the following shareholding:

First respondent	40,000 shares
Yu Chee Lieng	40,000 shares
Yu Chee Hoe	40,000 shares
Francis Yu	15,000 shares
Richard Yu	15,000 shares

[14] Yu Chee Lieng passed away on 19 April 2012 and on 2 September 2013, Francis Yu and Richard Yu sold their 30,000 shares to Yu Chee Hoe for a consideration of RM30,000. This resulted in the following shareholding:

Yu Chee Hoe	70,000 shares
First respondent	40,000 shares
Estate of Yu Chee Lieng	40,000 shares

[15] In or around 1998, the Hock Seng Lee group of companies was restructured. As a result, Huten Marine Sdn Bhd and Hock Seng Lee Machinery Sdn Bhd became wholly owned by the appellant. In or around February 2014, the appellant purchased 70% of shares in Megapron Engineering Sdn Bhd (Megapron) from one, Ting Ing Huong.

[16] On 6 November 2013, the second respondent commenced Originating Summons No: KCH-24-163-11-2013 to rectify the register of HSLESB to record his name as a shareholder. The second respondent claimed that he was the beneficial shareholder of the shares he had earlier transferred to the four sisters. The said originating summons was ultimately converted to a writ and was ordered to be tried. This led to a series of actions commenced by the respondents and the other brothers. Ultimately, a total of nine Winding up petitions and suits involving the various companies were filed.

[17] One of the suits was commenced by Ting Ing Houng, the former shareholder of Megapron *vide* Civil Suit No: KCH-22NCVC-14-3-2014. In the said suit, Ting Ing Houng contended that the 70% shares he held in Megapron was wrongfully transferred to the appellant. He claimed that the shares were held on trust for the second respondent.

[18] All nine suits were ordered to be consolidated and tried together (the "consolidated suits"). The trial had commenced on 23 March 2015 and as at the hearing of the appeal, was ongoing. The crux of the respondents' position in the said trial is that the second respondent is a beneficial shareholder in all the Hock Seng Lee Group companies as it was the intention of the father that each brother benefit from the proceeds of all the companies equally, ie, 1/6 share each. The other side, led by Yu Chee Hoe ("Yu Chee Hoe's side"), contended that no such family agreement existed as each company had a specific shareholding structure. The second respondent had, in any event, renounced his rights as a shareholder when he transferred his shares between 1998 and 2002.

The Winding Up Petition

[19] The petition was filed under s. 218(1)(f) and/or (i) of the Act on 24 March 2016. The respondents were not directors of the appellant at the time the petition was filed. The respondents filed the petition as

contributories of the appellant. The second respondent claimed to be a contributory on the basis that Yu Tung Sing was to hold the 30,000 shares in trust for him.

[20] The respondents' grounds for filing the petition was essentially that, Yu Chee Hoe's side were running the affairs of the appellant in their own interest and that the respondents had been deprived of their rights to equal participation in the management and affairs of the appellant.

[21] On 29 March 2016, the respondents filed an application to appoint a provisional liquidator ("encl. 3"). The appellant had filed an affidavit to oppose encl. 3 on 22 April 2016 ("encl. 6").

[22] The petition was served on the appellant on 1 April 2016. It was then served on the then solicitors for the appellant, Messrs Thomas, Shankar Ram & Co, on 11 April 2016.

[23] The court's computerisation system automatically scheduled the hearing of the petition on 25 April 2016. On 18 April 2016, the appellant filed a notice of intention to oppose the petition ("encl. 11"). On the same day, the appellant's then solicitors, by way of a letter, had informed the High Court that the appellant will file an affidavit to oppose the petition on 25 April 2016. The then solicitors for the appellant explained that the affidavit was almost ready but they needed time as the exhibits were voluminous ("encl. 15"). The then solicitors for the appellant had also sought for an adjournment of the hearing of the petition by way of its letter dated 18 April 2016.

[24] The respondents' solicitors, by way of its letter dated 20 April 2016, had objected to the appellant's request for an adjournment. The Kuching High Court had decided to adjourn the hearing of the petition to 27 April 2016 on the same day.

[25] On 22 April 2016, the appellant had filed an affidavit to oppose the petition ("encl. 31"). Enclosure 31 contained approximately 2192 pages. The documents exhibits were the same documents/cause papers used in the consolidated trial. The appellant opposed the petition on the ground that the respondents had filed the petition in bad faith and with unclean hands. The appellant is a financially healthy company with profit making subsidiaries.

[26] On 25 April 2016, the appellant filed an application to consolidate the petition with the consolidated suits ("encl. 27"). The facts and issues in the petition were substantially similar to the consolidated suits. The appellant had also filed an application to hear the petition by oral evidence on the same day.

[27] During the hearing of the petition on 27 April 2016, counsel for the respondents had raised an objection on the non-compliance of r. 30(1), Winding-up Rules. The said rule provides:

> Affidavits in opposition to a petition that a company may be wound up shall be filed and a copy thereof served on the petitioner or his solicitor at least seven days before the time appointed for the hearing of the petition.

[28] Counsel for the respondents argued that since encl. 31 was filed out of time, the appellant had "no leg to stand to oppose and/or to pursue any courses before the winding up court". He sought for order in terms of the petition on this ground alone. Counsel for the respondents did not argue on the merits of the petition in his written submission dated 25 April 2016 nor during the hearing on 27 April 2016.

[29] Counsel for the appellant then explained to the learned trial judge that he was only served with the petition on 11 April 2016. He argued that the appellant be given a right to be heard on the merits of the petition. Pertinently, counsel for the appellant made an oral application for an extension of time for encl. 31 ('the oral application"). Counsel for the appellant had said:

> I make an oral application for any extension of time if required but the affidavits of the respondent must not be disregarded, there is a decision of His Lordship Tan Sri Richard Malanjum.

[30] The learned trial judge then fixed 13 May 2016 as the date for decision.

[31] On 28 April 2016, notwithstanding having made the oral application, the appellant filed a formal application under rr. 193 and 194, Winding-up Rules 1972 to abridge and/or enlarge time for encl. 31 ("encl. 39"). The said rules provides:

> **193 Enlargement or abridgment of time.**
>
> The Court may, in any case in which it shall see fit extend or abridge the time appointed by these Rules or fixed by any order of the Court for doing any act or taking any proceeding.
>
> **194 Formal defect not to invalidate proceedings.**
>
> (1) No proceedings under the Act or the Rules shall be invalidated by any formal defect or any irregularity, unless the Court is of the opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of the Court.
>
> (2) No defect or irregularity in the appointment or election of a receiver, liquidator, or member of a committee of inspection shall vitiate any act done by him in good faith.

[32] The appellant's main ground for encl. 39 was that it should be given the right to be heard and that no injustice would be caused by allowing the application. The appellant had also stated that Yu Chee Hoe, the director of the appellant, was in Singapore for medical treatment and only came back to Kuching on 22 April 2016.

[33] On 12 May 2016, the learned trial judge had allowed the petition on the ground that encl. 31 was not filed in compliance with r. 30(1), Winding-up Rules 1972. The petition was not heard on the merits and neither was encl. 39. The learned trial judge then proceeded to stay the Winding up order pending an appeal on the same.

The Appeal

[34] We find that the memorandum of appeal contains various grounds of appeal (pp. 14-20 AR vol. 1). But, before us learned counsel for the appellant canvassed only one issue namely that the learned trial judge erred in fact and/or law in concluding that encl. 31 had to be disregarded. It was submitted that the learned trial judge erred in disregarding encl. 31 and in holding that the appellant had not complied with r. 30(1), Winding-up Rules 1972. Learned counsel for the appellant argued that though the appellant had not complied with r. 30(1), it had through counsel made an oral application for an extension of time on 27 April 2016 and had subsequently made a formal application *vide* encl. 39. The learned trial judge in her grounds nevertheless commented that "the respondent did not even make an oral application to extend the time" (p. 45 AR vol. 1).

[35] Learned counsel for the appellant further argued that the learned trial judge erred when Her Ladyship considered herself to be bound by the decision of the Court of Appeal in *Crocuses & Daffodils (M) Sdn Bhd v. Development & Commercial Bank Bhd* [1997] 3 CLJ 485; [1997] 2 MLJ 756 and six other Court of Appeal decisions applying *Crocuses*'s principle (pp. 41-42 AR Vol. 1). As submitted by learned counsel, *Crocuses* was recently revisited by the Federal Court in *Kilo Asset Sdn Bhd v. Hew Tai Hong* [2016] 2 CLJ 365.

[36] In *Kilo Asset (supra)* the Federal Court held that the principle enunciated in *Crocuses* that r. 30(1), Winding-up Rules 1972 had to be adhered strictly, cannot be endorsed as correct. His Lordship Raus Sharif PCA said at pp. 375-376:

> [27] The decision and reasoning of the Court of Appeal in *Crocuses & Daffodils* was followed and adopted in number of cases. (see *Jerry Ngiam Swee Beng v. Abdul Rahman Mohd Rashid & Anor* [2001] 1 CLJ 844; *United Merchant Finance Bhd v. Magpie Resources Sdn Bhd* [2001] 5 CLJ 464; *Unispan Formwork Sdn Bhd v. Kim Choy Tractor Works Sdn Bhd* [2004] 4 CLJ 151; *Dataprep (Malaysia) Sdn Bhd v. Utas Lambang Sdn Bhd* [2009] 7 CLJ 163;

A *Delta Drive (M) Sdn Bhd v. Hong Leong Finance Bhd* [2007] 4 CLJ 435; [2007] 5 AMR 93; *Anvest Corporation Sdn Bhd v. Wong Siew Choong Sdn Bhd* [2008] 3 CLJ 317; [2008] 3 MLJ 334).

[28] *Learned counsel for the company submitted that we should endorse the decision of the Court of Appeal in Crocuses & Daffodils in view of its settled legal position.*
B *With respect, we are however not persuaded to do so.*

[29] *We are of the view that although the wordings of r. 30(2) of the Winding-up Rules seem to be mandatory in nature, one must not lose sight of the general powers of the court to abridge time as envisaged under rr. 193 and 194(1) of the same.* Those rules provide as follows:

C **193. Enlargement or abridgment of time**

The Court may, in any case in which it shall see fit extend or abridge the time appointed by these Rules or fixed by any order of the Court for doing any act or taking any proceeding.

194. Formal defect not to invalidate proceedings.

D (1) No proceedings under the Act or the Rules shall be invalidated by any formal defect or any irregularity, unless the Court is of the opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of the Court.

E Further, s. 221(2)(b) of the Companies Act 1965 is also a saving provision as it provides for the following:

Powers of Court on hearing petition

221(1) On hearing a winding up petition the Court may dismiss it with or without costs or adjourn the hearing conditionally or unconditionally
F or make any interim or other order that it thinks fit, but the Court shall not refuse to make winding up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets or that the company has no assets or in the case of a petition by a contributory that there will be no assets available for distribution amongst the contributories.

G *(2) The Court may on the petition coming on for hearing or at any time on the application of the petitioner, the company, or any person who has given notice that he intends to appear on the hearing of the petition -*

(a) …

H *(b) dispense with any notices being given or steps being taken which are required by this Act, or by the rules, or by any order of the Court;* (emphasis added.)

[30] Bearing the above provisions in mind, we find that the powers of the court to extend or abridge time are not restricted by the words employed in r. 30(2) of the Winding-up Rules. Rules 193 and 194 of the Winding-up Rules, together with s. 221(2) of the Companies Act 1965 clearly give
I the court power to exercise its discretion to abridge the time prescribed

in r. 30(2). In our considered view, the Winding-up Rules have to be read harmoniously, and the rigours of r. 30(2) must be tempered by rr. 193 and 194 of the Winding-up Rules and s. 221(2) of the Companies Act 1965.

[31] As we alluded to above, it is crystal clear from a bare reading of r. 194(1) of the Winding-up Rules that: "… no proceedings under the Act or the Rules shall be invalidated by any formal defect or any irregularity, unless the court is of the opinion substantial injustice has been caused … and that the injustice cannot be remedied by any order of court". Rule 193 further provides that the court can on application extend time to do any act under the Winding-up Rules.

[32] Further, it is clear from s. 355(1) of the Companies Act 1965 that technical non-compliance can only invalidate a proceeding under the Act if the court is of the view that substantial injustice has been or may be caused by such non-compliance and the injustice cannot be remedied by any court order. Section 355(1) of the Companies Act 1965 provides that:

Irregularities in proceedings

355(1) No proceeding under this Act shall be invalidated by any defect, irregularity or deficiency of notice or time unless the Court is of opinion that substantial injustice has been or may be caused thereby which cannot be remedied by any order of the Court.

[33] As for the reliance placed on the case of *Crocuses & Daffodils*, we note that the judgment in that case did not touch on the discretionary powers of the court under rr. 193 and 194 of the Winding-up Rules. Neither did it even consider the discretionary powers of the court under s. 221(2)(b) of the Companies Act 1965 which empowers the court to validate formal defects or irregularities. Thus, we are of the view that the reasoning of the Court of Appeal in *Crocuses & Daffodils* is not the conclusive authority for holding that the court has no discretion to abridge the time prescribed in r. 30 of the Winding-up Rules.

[37] We further agreed that the learned trial judge's reliance on *Crocuses & Daffodils* was therefore misplaced as the said decision is only limited to its facts and it cannot be applied to a Winding up petition under s. 218(1)(i) as in the case at hand as Raus Sharif PCA clearly stated in *Kilo Asset* at p. 377:

[34] *It follows therefore that the Court of Appeal's decision in Crocuses & Daffodils must be construed to apply only to the facts peculiar to that case.* The facts in *Crocuses & Daffodils* clearly showed that there was inordinate delay, with the court observing that the service of all the affidavits on the bank had clearly and blatantly contravened the mandatory time prescribed under r. 30(1) of the Winding-up Rules. This was also a case where the petitioner had a judgment in hand obtained on 4 July 1991, where the original hearing date of the petition was 24 September 1992. It would therefore seem that there could be no excusable reason why the affidavits had to be filed out of time. *The Court of Appeal in Crocuses & Daffodils in deciding as it did was also swayed by the fact that the company's indebtedness had been*

A *established as long ago as 1984. The Court of Appeal emphasised that proceedings in the form of execution of judgment should never be allowed to drag and more so where such proceedings concerned the compulsory winding up of a company.*

[35] With the above in mind, with respect, *we find that learned counsel for the company's reliance on the case of Crocuses & Daffodils is misplaced. In our considered view, courts are not restricted by that case in exercising its powers under rr. 193 and 194 of the Winding-up Rules. Had it been intended that they should not be applied to r. 30, the former would have said so in very clear terms.* (emphasis added)

[38] We observed that the learned trial judge had erroneously distinguished *Kilo Asset* on the ground that the application for an extension of time in *Kilo Asset* was filed before the hearing of the Winding up petition. At pp. 44-45 AR vol. 1, Her Ladyship stated as follows in her grounds:

In coming to a decision in this case I am fully aware that Rule 193 of the said Rules gives the court the discretion to extend or abridge time and indeed the respondent has done so by way of filing a specific application for it ie, enclosure 39 but only on 28th April 2016, a day after the hearing on 27th April 2016 and in the interim period before delivery of this decision. That is regrettably too late. For this reason, the Federal Court decision of *Kilo Asset Sdn Bhd v. Hew Tai Hong* [2016] 2 CLJ 365 submitted by learned counsel for the respondent's secretary in his written submission is distinguishable because in that case the application for extension of time to file an affidavit in reply to the affidavit in opposition was filed before the hearing of the petition itself - but it was dismissed. In this case before me, the respondent did not even make an oral application to extend the time. Therefore there is simply no justification for me to exercise my discretion to do so under Rule 193. I also noted that the respondent has also made two other applications - to consolidate this petition with the nine part-heard cases (enclosure 37) and for the petition to be heard by way of viva-voce evidence (enclosure 29). All these applications do not in any way affect my decision to apply the law as laid down in the ratio of all the above-named cases to the facts of this case. It would therefore mean that the petition is unopposed and the averments deposed in the affidavit in support and the affidavit verifying the petition in support of the grounds for winding up the respondent should be accepted by me. Thus, make the Winding-up order I must in terms of prayer 100 (A), (B) and (D) of the petition but given these unheard applications and the ongoing trial of nine cases in this bitter feud amongst the Yii/Yu family, and in the interest of justice I take it upon myself to stay the Winding-up order which I am certain would be appealed even without any formal application for the same. Or course, in the remotest of chance that my decision is accepted by the respondent, the stay would be automatically lifted. As for cost, since it is technically an unopposed petition, I fix it at RM5,000.00 to be paid by Yu Chee Hoe and Tony Yu Young Wee as prayed in the petition.

[39] We are of the view that the learned trial judge had not sufficiently considered the material facts before her which tainted Her Ladyship's decision in exercising her discretion judicially as required under the law. Material facts not judicially considered by the learned trial judge are as follows:

(a) that the oral application was made by the appellant's counsel during the hearing of the petition and as such Her Ladyship erred in forming the view that no such application was ever made;

(b) that rr. 193 and 194, Winding-up Rules 1972 do not state that any such application must be made before the hearing of a Winding up petition; and

(c) that the Federal Court, in our view, did not limit its *ratio* to the applications filed before the hearing of the Winding up petition. Therefore, it is obvious to us that in doing so in the present case, the learned trial judge had acted against the principle of *stare decisis* in limiting the ratio of the Federal Court in *Kilo Asset* (see *Perantara Properties Sdn Bhd v. JMC - Kelana Square & Another Appeal* [2016] 5 CLJ 367).

[40] Further, we are of the view that it is the bounden duty of the learned trial judge to consider the oral application and/or the appellant's application in encl. 39 as any delay to hear the same could not in our view occasion a failure of justice to the respondents. The failure of the learned trial judge to consider the appellant's oral application and/or encl. 39 application for an extension of time in fact caused prejudice and great injustice to the appellant which warrants appellate intervention. We echoed the view of Raus Sharif PCA in *Kilo Asset* at pp. 377-378, as below:

> [38] We are of the unanimous opinion that courts when exercising its powers under r. 193 and r. 194 of the Winding-up Rules must be wary of all the surrounding circumstances of each case. In exercising such discretion, courts must weigh the interest of both parties in accordance with the facts and circumstances of the each case. In the instant case, having considered the facts and circumstances, we find that no injustice, let alone substantial injustice, had been caused by the defect or irregularity. Further, it had not been shown to us that the injustice, if any, cannot be remedied by an order of the court. That being the case, in our considered view the High Court erred as it ought to have exercised its powers under rr. 193 and 194 of the Winding-up Rules in favour of the petitioner and allowed the affidavits to be used in the hearing of the petition on merits. In this case, we find that the irregularity did not cause any injustice to the company, and the delay by the petitioner in filing the affidavits was inconsequential and could be safely condoned under rr. 193 and 194 of the Winding-up Rules and s. 221(2)(b) and s. 355 of the Companies Act 1965.

A **[41]** On the facts and circumstances of this appeal, namely given the various applications and on-going trial on the dispute amongst the Yii/Yu family, we opined that justice of the case would be best served if the winding up petition be heard on the merits.

B **[42]** For the abovestated reasons, we allowed the appellant's appeal. We set aside the order given by the High Court. We revert back the matter before the learned trial judge for consideration on the merits of the petition. We further ordered that the costs to be in the cause and deposit to be refunded.

C

D

E

F

G

H

I